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No. 98-1097

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

U-HAUL CO. OF CLEVELAND,
Petitioner,
v.
LEE KUNKLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Respondent Kunkle recognizes that the issue pending before this Court in *Cleveland* v. *Policy Management Systems Corp.* "arises * * * because it can be inconsistent for a disabled person to represent that he *can* perform the essential functions of his position, for purposes of the ADA, if he has previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability program." Opp. at 4 (emphases in original). There is no dispute that respondent Kunkle has, through this ADA litigation, "represent[ed] that he *can* perform the essential functions of his position," and that he has "previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability pro-

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[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

gram." Thus, the questions at issue in *Cleveland* also "arise" in this case. The Court should therefore defer consideration of the petition until it issues its decision in *Cleveland*, and then dispose of the petition as appropriate in light of that decision.

In his effort to avoid this result, respondent contends that this case differs from *Cleveland* on several grounds, and that these differences present obstacles to consideration of this case no matter what the outcome of *Cleveland*. Respondent's attenuated efforts to distinguish this case from *Cleveland* provide no basis for denying the petition. The issues presented in *Cleveland* are also present here, and the claimed distinctions should, at most, be considered by the court below after resolution of the legal questions presented in *Cleveland*.

1. Respondent's arguments notwithstanding, both this case and *Cleveland* involve the same type of contradictory representations about disability. Both Cleveland and Kunkle applied for Social Security benefits on the ground that they were disabled, and each nonetheless claims in subsequent ADA litigation to be a "qualified individual with a disability." Respondent contends that Cleveland never "indicated to the Social Security Administration (SSA) that she was anything other than totally disabled and unable to return to work," and that "[w]hat distinguishes Kunkle's case from Cleveland's is the fact that once Kunkle recovered to the point * * * that he could return to work, he told SSA so." Opp. at 5. As the Fifth Circuit observed in its *Cleveland* opinion, however, Cleveland also alleged "that when she returned to work * * * she contacted SSA and informed them that she had returned." *Cleveland* v. *Policy Management Sys. Corp.*, 120 F.3d 513, 514 (5th Cir. 1997). There is therefore no basis for Kunkle's efforts to distinguish his case factually from Cleveland's.

2. Respondent also contends that his case is "not even a case for judicial estoppel" because of his participation in the "trial work" program under 42 U.S.C. § 422(c) and 20 C.F.R. § 404.1592(a). Opp. at 4, 5. To participate in this program, respondent explains, he did not have to continue in his earlier representations that he was disabled from working, and therefore should not be estopped from claiming to be a qualified individual with a disability for purposes of his ADA lawsuit. Opp. at 5-6.

This argument ignores the issues in *Cleveland*—whether *prior* representations of disability for purposes of Social Security disability benefits give rise to a rebuttable presumption in the ADA context and, if not, what evidentiary weight, if any, they should be accorded. Regardless of the conditions under which Kunkle returned to work, the fact remains that he—like Cleveland—first claimed to be disabled and later claimed to be qualified to work. Once the Court clarifies the effect of such facts in *Cleveland*, the case should be remanded to the lower courts to determine the impact of that determination in the particular circumstances of this case. Indeed, that is the purpose for which the Court frequently employs the "GVR" procedure. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits"). *See also id.* at 181 (GVR in light of a postjudgment decision of this Court is "appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts)") (Scalia, J., dissenting).

3. Respondent's waiver argument also provides no basis for denying the petition. That argument is grounded in the premise that U-Haul's petition is based solely on judicial estoppel, Opp. at 6, and that at oral argument

in the Sixth Circuit U-Haul's counsel recognized that recent circuit precedents, including *Blanton* v. *Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), *supplementing* 108 F.3d 104 (6th Cir. 1997), and *Griffith* v. *Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998), *pet. for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991), were against it on the broad judicial estoppel point.

Petitioner's recognition that one of its arguments was "foreclosed" in the court below by circuit precedent, Pet. App. 11a—which may no longer be good law after *Cleveland*—hardly precludes it from pressing that argument *here*.

There is no dispute that in the courts below, U-Haul raised a judicial estoppel argument *and* argued that it was entitled to judgment as a matter of law if Kunkle's statements to the SSA were accorded appropriate evidentiary weight. *See* Pet. 7 & n.2.[2] By the time the case reached oral argument in the Sixth Circuit, however, that court had—in *Blanton* and *Griffith*—rejected application of a *per se* judicial estoppel doctrine in this context. While petitioner therefore "conceded" at argument the current state of Sixth Circuit law, that "concession" was not in any sense a waiver of the argument (and the Sixth Circuit did not so hold, *see* Pet. App. 11a), and provides no basis for denying the petition in light of the distinct possibility that the law might well have to be revisited by the Sixth Circuit after resolution of the pending *Cleveland* case.

First, the Court in *Cleveland* might determine that there is in fact a rebuttable presumption of judicial estoppel in these circumstances. If that were the case, the Sixth Cir-

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[2] These two arguments, in fact, parallel the two questions the Court formulated when it granted certiorari in *Cleveland*, which are the questions presented in this case. *See* 67 U.S.L.W. at 3228-29; Pet. i.

cuit would likely have to re-examine its own precedents rejecting judicial estoppel outright, and U-Haul's statements concerning the effect of those precedents in the Sixth Circuit—like the precedents themselves—would no longer be pertinent. Certainly, in that event, there would be "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"—the sort of occasion in which a "GVR" is standard practice. *Lawrence* v. *Chater*, 516 U.S. at 168.[3]

Second, the Court in *Cleveland* might reject application of judicial estoppel in these circumstances and proceed to answer the second question it formulated—"what weight, if any should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a 'qualified individual with a disability' under ADA?" 67 U.S.L.W. at 3228-29. In this event, U-Haul's purported "concession" below would also be irrelevant, for U-Haul has maintained throughout this litigation that it is entitled to judgment as a matter of law if Kunkle's claims of disability before the SSA are given appropriate evidentiary weight. Indeed, in its decisions rejecting *per se* judicial estoppel, the Sixth Circuit itself recognized that statements concerning disability were nevertheless entitled to *some* evidentiary weight. *See* Pet. at 6. Once this Court clarifies the appropriate weight to be given to such statements, there could well be an occasion for the Sixth Circuit to re-examine its decision in this case.

In short, nothing about U-Haul's "concession" to the Sixth Circuit about the state of then-current *circuit* authority counsels against deferring consideration of the

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[3] While the Sixth Circuit's discussion might leave this Court in a position where it is "not certain that the case was free from all obstacles to reversal on an intervening precedent," it is the Court's practice even in that circumstance to grant, vacate, and remand for reconsideration in light of the intervening precedent. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964).

petition until *Cleveland* is decided, and then remanding the case to the Sixth Circuit to reconsider its decision in light of this Court's guidance in *Cleveland.*

4. It is clear that a decision by this Court in *Cleveland* could well give rise to "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater,* 516 U.S. at 167. The prudent course, therefore, is to hold the petition pending resolution of *Cleveland.*[4]

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[4] *See* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions,* 11 Hastings Const. L. Q. 5, 38 n.127 (1983) (arguing that it "would make a good deal of sense" to hold petitions that even remotely involve issues presented in pending cases, because "[t]he relevance of the plenary decision will often depend on how—and how broadly—the Court resolves the various issues presented. At the time the new case is filed, there may be no way of knowing what the result of the plenary decision will be, or which of several possible grounds ultimately will command a majority").

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should defer consideration of the petition until it issues its decision in *Cleveland* v. *Policy Management Systems Corp.*, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted,

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